IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.621 OF 2007
IN
NOTICE OF MOTION NO.2375 OF 2007
IN
S.C. SUIT NO.2413 OF 2007

Ms. Mona Gehani .. Appellant
Orig.Plaintiff

Versus

1. M/s. Dhruv Constructions,

2. M/s. City Life Developers .. Respondents
Orig.Defendants

Mr. V.P. Sawant i/b. Mr.P.K. Gautam for the Appellant
Mr. Sanjay Jain for the Respondents-orig.defendants

CORAM : S.R. SATHE,J.
DATED : 17/08/2007

ORAL ORDER :-

1. By consent heard finally at admission stage.

2. Appellant-original Plaintiff in S.C. Suit No.2413 of 2007 has preferred this appeal against the judgement and order passed by the Judge, City Civil Court, Bombay whereby the Plaintiff's application for ad-interim relief restraining the defendants from selling, transferring and/or creating any third party interest in the Suit Flat No.1603, 16th floor Agarwal Trinity Tower, Malad (West) was rejected. For the sake of convenience hereafter the parties shall be referred to as 'Plaintiff' and 'defendants'.

3. The brief facts giving rise to this appeal are as under :-

By virtue of registered agreement to sell dated 08/11/2006 defendants agreed to sell the suit flat to Plaintiff for Rs.23,86,460/-. Till 21/11/2006, the Plaintiff had actually paid Rs.11,96,482/- to the defendants-builders/developers.On 21/11/2006 defendants called upon the Plaintiff to pay further amount of Rs.6,72,757/- within 7 days from the receipt of the said letter. In order to raise the said amount, Plaintiff wanted to secure loan from the Bank of Maharashtra. She, therefore, requested defendants to issue one letter to the bank informing the bank that Plaintiff has entered into an agreement as mentioned above and they have no objection for Plaintiff mortgaging the said flat with the said bank. Accordingly, the defendants issued necessary letters dated 21/11/2006 to Bank of Maharashtra, Andheri, Mumbai. Thereafter, the bank sanctioned the loan and actually remitted total amount of Rs.6,72,757/- under two pay orders directly to the defendants on 20/02/2007. However, on 26/02/2007, the defendants returned the said pay order to bank. Then on 15/03/2007, the defendants informed the Plaintiff that

they have cancelled her suit flat as there was delay in making payment and that she should approach the head office within 3 days for further formalities. Thereafter, on 09/05/2007, the Plaintiff received one instrument styled 'cancellation of agreement' from Respondents. She, therefore, filed the suit for specific performance of the above mentioned agreement to sale and also submitted an application and prayed for ad-interim relief that defendants be directed not to create third party interest in the suit flat.

4. The learned City Civil Judge heard the arguments of both the learned Advocates and after considering the said arguments and the documents produced by the Plaintiff, he came to the conclusion that there was clear cut violation of clause-5 and 8 of the agreement by the Plaintiff. Plaintiff also supressed the fact of cancellation of agreement and as time was essence of the contract the defendants were justified in cancelling the agreement to sale. He, therefore, held that Plaintiff is not entitled for ad-interim relief as prayed.

5. Being aggrieved by the said order, Plaintiff has filed the present appeal. In this appeal before me,

Shri V.P. Sawant, learned Advocate for the appellant has urged only two points. Firstly, he submitted that the Plaintiff had made substantial payment as per the agreement. Not only that but thereafter, the Plaintiff had secured loan from the bank and pay orders were in fact sent by the bank to the defendants but the defendants wrongly refused to accept the same and on the contrary, cancelled the suit agreement unilaterally. He also submitted that Plaintiff had time and again approached the defendants and requested them to accept money. However, defendants sent cancellation agreement. According to him, if ad-interim injunction is not granted then Plaintiff will suffer irreparable loss and she would not be in a position to purchase the suit flat. As against this, even if ad-interim relief is granted no loss is likely to be caused to the defendants. He, therefore, submitted that the appeal be allowed and ad-interim relief as claimed by the Plaintiff be granted.

6. As against this, Shri Sanjay Jain, learned Advocate for the defendants submitted that the Plaintiff had committed breach of clause-8 of the agreement and as she did not make the payment within stipulated time, defendants were entitled to cancel the

agreement and accordingly, they have in fact cancelled the agreement by issuing letter dated 15/03/2007. He further submitted that even after the letter of cancellation, the Plaintiff did not give any reply to the said letter but kept mum and it is only in June-2007 having noticed that there is substantial increase in the prices of the flats, the Plaintiff has filed the present suit. According to him, the same is not bonafide and irreparable loss is likely to be caused to the defendants if injunction is granted. He, therefore, submitted that appeal be dismissed.

7. It is not in dispute that on 08/11/2006, Plaintiff agreed to purchase the suit flat and accordingly registered agreement was executed between the parties. Admittedly, till 21/11/2006, the defendant had actually received the amount of Rs.11,96,482/-. It is true that by letter dated 21/11/2006, the defendant had called upon the Plaintiff to make payment of Rs.6,72,757/- within 7 days from the receipt of the letter. It is also true that such payment has not been made by the Plaintiff within the above period. However, that by itself can not be a criteria in the instant case to decide at this stage as to whether the said default on the part of Plaintiff is sufficient to

justify cancellation of the agreement in question.

8. The learned Trial Judge ought to have borne in mind that he was not deciding the suit finally but he was considering only Plaintiff's prayer for ad-interim relief. It is well settled that while considering the point of ad-interim relief one need not decide all the points on merits in detail. All that is necessary is to find out whether Plaintiff has made out a prima facie case for granting ad-interim relief and that if such ad-interim relief is not granted, irreparable loss is likely to be caused to Plaintiff and that balance of convenience is in favour of Plaintiff. However, from the perusal of the order passed by the learned Trial Judge, it appears that he has not at all considered the point of prima facie case, balance of convenience and irreparable loss.

9. In order to find out whether the defendants were justified in cancelling the agreement on 15/03/2007 one has to take into consideration all the facts and circumstances of the case. It is true that defendant had called upon the Plaintiff to make the payment of Rs.6,75,757/- within 7 days. But at the same time, it does appear that as per the request of

Plaintiff, defendant had even issued letter to the bank and a such the defendants were aware that the above mentioned payment is to be received by them after Plaintiff obtaining loan. In a way defendant had given such concession to Plaintiff. Not only that but we find that as per the request of the Plaintiff, the Bank of Maharashtra sanctioned loan to the Plaintiff and actually sent the pay orders of the said amount to the defendants on 20/02/2007. However, unfortunately, the defendants returned the said pay order to the bank on 26/02/2007. In fact, there is nothing on record to show that till that date the defendant had informed the Plaintiff that as she has not made payment within 7 days from their letter dated 21/11/2006 they have cancelled the agreement. In my opinion, this is the most important relevant conduct of the defendants which in fact goes to show that till the time they sent letter dated 15/03/2003, they had in fact no intention to cancel the Plaintiff's agreement. In fact, it is worth to note that even in the letter dated 26/02/2007 while returning pay orders to the bank the defendants did not inform the bank that the question of accepting payment towards Plaintiff's account does not arise because they have cancelled the Plaintiff's agreement. On the contrary, the defendants have mentioned in the

letter :-

> *“ We regret to inform we can not accept the above mentioned cheques from you as we have some issues to be decided between ourselves and Mrs.Mona Gehani (Plaintiff)”.*

10. This sentence speaks volumes. Prima facie it does indicate that till that date the agreement was not cancelled. So, once we take into consideration the fact that the Plaintiff had actually offered money claimed by the defendants prior to actual cancellation of the agreement, defendants were in fact no justified in cancelling the said agreement on 15/03/2007. At least, prima facie the defendants have not brought on record by filing their reply that the Plaintiff was made aware that non-receipt of the amount in time would amount to cancellation of the agreement.

11. It is worth to see the contents of the letter dated 15/03/2007 written by defendants to Plaintiff. It is mentioned therein :-

> *“ We refer to our previous letters & telephonic talk wherein you were requested to make the payment to which*

you have yet not responded. Therefore, we have cancelled your flat. Therefore, you are requested to approach our HEAD OFFICE within 3 days of receipt this letter for further formalities."

12. Relying on the above mentioned letter, it was argued before me by the learned Advocate for the defendants that the agreement in question between Plaintiff and defendants is already cancelled and as such now there is no question of granting any ad-interim relief. Incidently, it must be noted that during the course of arguments, the learned Advocate for the defendants was asked as to whether the defendants have created any third party interest in the suit and the learned Advocate fairly submitted that the defendants have not created any third party interest. In my opinion, they have not created any third party interest because they were also in fact knowing that the agreement in question has not been properly and legally cancelled by them. I would presently point out as to why I am of the said view.

13. In clause-8 of the suit agreement it is mentioned :-

"If the Purchaser/s commit/commits default in payment of any of the installments as stated in Clause 5 hereinabvoe, and/or hereinafter on the respective due dates, time being the essence of the contract or commits breach of any other condition herein and if the default or breach continues even after 15 (fifteen) days of notice in writing to that effect given by the Promoters and/or the Developers at the instance of the Promoters to the Purchaser/s then the Promoters/Developers shall be entitled at their own options to terminate this Agreement ***PROVIDED ALWAYS that the power of termination hereinabove contained shall not be exercised by the Promoters/ Developers unless and until the Promoters/ Developers have intimated the purchaser the specific reason of the default or breach committed by the Purchaser/s of the terms and conditions in respect of which it is intended to terminate the Agreement and default shall have been made by the Purchaser/s in***

remedying such breach or breaches within the time mentioned above after giving of such notice. *" (Emphasis is mine).*

From the above mentioned clause, it is very clear that as Plaintiff failed to make the payment within stipulated time after receipt of the letter dated 21/11/2006, it had given a right to the defendants to cancel the agreement. However, by virtue of above mentioned clause there was specific agreement between the parties, as to how the right accrued to defendants regarding cancellation of the agreement should be exercised. The later portion of the above mentioned clause to which emphasis is placed goes to show that after the purchaser's failure to make the payment as per the time schedule, if defendants had intention to cancel the agreement then it was obligatory on the part of the defendants to intimate such intention by specific notice to the Plaintiff-purchaser and to give her an opportunity for remedying the breach. This exactly has not been done by the defendants in the instant case. But on the contrary, they straight way issued a letter to the Plaintiff that they have cancelled the agreement. So, when particular procedure was laid down by the agreement to exercise

the power of cancellation of the agreement and the said procedure has not been followed by the developer/builder or defendants in the instant case then alleged termination can not be said to be valid. So, I am of the considered view that here is a case where Plaintiff has made out a prima facie case to show that she has legal right to purchase the property in question and there is reasonable apprehension that if the ad-interim relief is not granted then defendants may create third party interest and if such interest is created then obviously it will give rise to many complications and multiplicity of proceedings and at the same time, it would cause irreparable loss to the Plaintiff. As against this, if ad-interim relief is granted against the defendants no loss is likely to be caused to them because they will be getting money in respect of the suit flat as per the agreement. If at all there is any delay then they can recover interest over the said amount.

14. We can not ignore the fact that in the instant case, agreed price of the suit land is Rs.23,86,460/- out of which amount of Rs.11,96,482/- was actually paid by the Plaintiff and further payment of Rs.6,72,757/- was also tendered which means out of Rs.23,86,460/-

Plaintiffs were making payment of Rs.18,69,239/- i.e. 75% payment was made by Plaintiff prior to the time the defendants issued letter dated 15/03/2007. So, it is difficult to believe that Plaintiff-purchaser who had decided to purchase a small flat of 453 sq.ft. for Rs.23,86,460/- and who had offered out of that ¾th amount was not ready and willing to perform her part of the contract.

15. Shri Sanjay Jain, learned Advocate for the defendants submitted that the view taken by the Trial Court can not be said to be impossible view and when the view taken by the Trial Court appears to be possible view then the Appellate Court Should not interfere with the discretion used by the Trial Court. In support of this proposition he has placed reliance on a case "**WANDER LTD. AND ANOTHER V/S. ANTOX INDIA P.LTD. 1990 (SUPP) SUPREME COURT CASES 727** wherein Apex Court has observed :-

> ***"14.*** *The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first*

instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions."

16. However, in the instant case, the learned Trial Judge has totally failed to consider the exact language used in clause-8 of the suit agreement. So, when he has ignored the important relevant factor, I think that the above mentioned observations of the Apex Court would in fact show that this is a fit case where it is necessary for this Court to interfere with the order passed by the learned Trial Judge. Though, passing remark had been made by the learned Trial Judge to show that the Plaintiffs supressed the fact regarding cancellation of the agreement, material on record goes to show that the said observation is also not factually correct.

17. In this view of the matter, I have no hesitation to hold that the order passed by the learned Judge, City Civil Court, Bombay refusing to grant ad-

interim relief is not proper, legal and correct. Hence, I pass the following order.

O R D E R

1. The appeal is allowed.

2. The order passed by the learned Judge, City Civil Court, Bombay refusing to grant ad-interim relief is set aside. Instead it is hereby directed that the defendants should not create any third party interest in any manner in respect of the suit property till the disposal of the Notice of Motion pending in the Trial Court.

3. Without prejudice to the rights of both the parties Plaintiff is hereby directed to deposit the amount which is due from plaintiff to defendants till today as per the time schedule given in the suit agreement, in this court within 10 days from today failing which the above mentioned ad-interim relief granted in favour of Plaintiff shall automatically stand vacated.

4. The Trial Court to decide the Notice of Motion according to law as expeditiously as possible and without getting influenced by the observations made by

this Court while disposing of this Appeal from Order.

5. Parties to act on the authenticated copy of this order.

(S.R. SATHE,J.)